2-13-2012

State v. Latneau Respondent's Brief Dckt. 38416

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38416
	)	
vs.	)	
	)	
NOAH LATNEAU,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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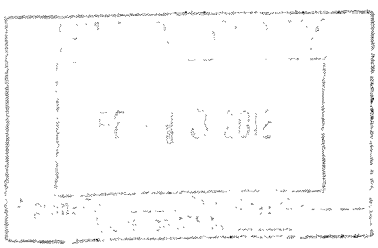

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STATEMENT OF THE CASE

Nature Of The Case

Noah Latneau appeals from his conviction for attempted strangulation.

Statement Of The Facts And Course Of The Proceedings

The state filed a complaint alleging that Latneau attempted to strangle his wife, Breena Latneau, and that he also assaulted Breena in the presence of three children. (R., pp. 6-7.) That same day the court entered an order prohibiting Latneau from having contact with Breena and the three children. (R., p. 10.) There were no exceptions to this order, which was set to expire on March 15, 2012, or upon dismissal of the criminal case. (R., p. 10.)

After a finding of probable cause the state charged Latneau with one felony count of attempted strangulation and one misdemeanor count of domestic assault. (R., pp. 23-24.) Pursuant to a plea agreement, Latneau pled guilty to attempted strangulation and the domestic assault charge was dismissed. (6/3/10 Tr., p. 5, L. 6 – p. 22, L. 1; R. pp. 37-46.) The district court, pursuant to the plea agreement, imposed a sentence of seven years with two years fixed and retained jurisdiction. (R., pp. 51-52.) The district court subsequently relinquished its jurisdiction after two hearings. (R., pp. 54-57, 59.) When it relinquished jurisdiction the district court also issued another no-contact order prohibiting contact with Breena Latneau and the three children, to expire June 24, 2017, the same length of time as the sentence. (R., p. 58.) This order allowed contact "through attorneys and/or during legal proceedings" (R., p. 58) and the court specifically stated that the order would be modified for contact as determined in

divorce proceedings (12/21/10 Tr., p. 27, Ls. 15-21). Latneau filed a notice of appeal timely from the order relinquishing jurisdiction. (R., pp. 61-63.)

ISSUES

Latneau states the issues on appeal as:

1. Did the district court's failure to advise Mr. Latneau that a no contact order prohibiting his contact with his children could be entered as a direct consequence of his guilty plea render the no contact order invalid?

2. Did the district court violate Mr. Latneau's procedural and substantive due process rights when it entered a no contact order which unduly restricts his fundamental rights to parent?

3. Did the district court abuse its discretion when it relinquished its jurisdiction following Mr. Latneau's rider?

(Appellant's brief, p. 3.)

The state rephrases the issues as:

1. Has Latneau failed to show fundamental error in the issuance of the no-contact order after sentencing?

2. Has Latneau failed to show an abuse of discretion in the district court's decision to relinquish jurisdiction?

ARGUMENT

I.
Latneau Has Failed To Show Fundamental Error In The Issuance Of The No-Contact Order

A. Introduction

At the retained jurisdiction review hearing the prosecution requested a no-contact order. (12/21/10 Tr., p. 7, L. 2; p. 11, Ls. 18-20.) Latneau did not object or even respond to the state's request. (12/21/10 Tr., p. 12, L. 24 – p. 19, L. 12.) For the first time on appeal Latneau asserts that by entering the no-contact order the district court retroactively rendered his plea involuntary (Appellant's brief, pp. 4-5) and violated his due process rights (Appellant's brief, pp. 6-15). Latneau does not claim the alleged errors are fundamental. Review shows that Latneau has established no error, much less reviewable fundamental error.

B. Standard Of Review

"Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (citations omitted). Where a claim is raised for the first time on appeal, the appellate court will consider whether the error alleged qualifies as reviewable fundamental error. Id. at 226, 245 P.3d at 978.

> [I]n cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. (footnote omitted).

C. Latneau Has Neither Claimed Nor Shown Fundamental Error In His Claim That His Plea Was Not Knowing And Voluntary

A "prima facie showing" that a plea was knowing and voluntary is made if the record reveals that a defendant was informed of the direct consequences of his plea by the trial court. State v. Heredia, 144 Idaho 95, 97, 156 P.3d 1193, 1195 (2007). "The trial court is not required to inform a defendant of consequences that are collateral or indirect." Id. Latneau claims, for the first time on appeal, that the no-contact order was a direct consequence of his guilty plea and therefore his plea was rendered involuntary by the fact that the district court did not explain the possibility of a no-contact order in the plea colloquy. (Appellant's brief, pp. 4-5.) He has failed to show any, much less all, of the prongs of a viable claim of fundamental error.

First, the record does not disclose any constitutional violation because the no-contact order entered in this case is not a direct consequence of the guilty plea. Whether a consequence is direct or collateral is decided by looking at three factors: whether the defendant has the ability to avoid the consequence; the punitive or remedial nature of the consequence; and the amount of control the sentencing court has over imposing the consequence. Id. at 98, 156 P.3d at 1193. Automatic non-punitive consequences such as sex offender registration are collateral, id.; State v. Flowers, 150 Idaho 568, 573, 249 P.3d 367, 372 (2011), while discretionary parts of a legislatively mandated sentence, such as

the obligation to pay child support to the children of the deceased victim, are direct, Heredia, 144 Idaho at 98, 156 P.3d at 1193.

In this case the no-contact order was subject to amendment to allow for contact as provided in the divorce proceedings. Therefore, the effects of the order may be avoided by Latneau by simply acquiring visitation or other rights in the divorce. Likewise, although the district court has some discretion in imposing the order the court effectively delegated the ultimate decision of contact to the divorce court. Latneau's divorce and custody fight are not a direct consequence of his guilty plea. Finally, there is no punitive aspect to the no-contact order, which is meant to protect victims and provides criminal penalties only for any future violations. Latneau has failed to show the protective order entered in this case was a direct consequence of his guilty plea and therefore has failed to show any violation of his constitutional rights.

Latneau has also failed to show that the error he claims is clear on the record, or that additional evidence would not be necessary to establish that the lack of an objection was not tactical. Latneau cites to no case actually holding that the possibility of a no-contact order is a direct consequence of a plea. The error claimed by Latneau is therefore not clear as a matter of law. Nor is the error clear on the record. Even if the possibility of a no-contact order was not addressed on the record in the district court's plea colloquy, such is only a "prima facie" showing of an invalid plea. It is not clear that Latneau was in fact ignorant of the possibility of a no-contact order. Thus, more evidence of what Latneau in fact understood about the consequences of his plea is necessary to determine its

voluntariness. Finally, there is every reason to believe that Latneau would not challenge the validity of his plea in the trial court because he did not wish to undo the plea agreement. If the law is as Latneau claims, and a defendant can entirely avoid a direct consequence of a guilty plea by merely remaining silent until appeal, then there is a huge incentive to "sandbag," a tactic the fundamental error standard seeks to prevent. Perry, 150 Idaho at 224, 245 P.3d at 976. There is no clear error here; Latneau has failed to show the second prong of the fundamental error test.

Finally there is no showing of prejudice. There is no reason to believe Latneau would not have accepted the plea agreement and pled guilty had he known that a no-contact order might be entered. There is thus no reason to believe the outcome of the proceedings would have been any different had Latneau been advised of the possibility of the no-contact order prior to entry of his guilty plea. Latneau has therefore failed to demonstrate prejudice as required by the third prong of Perry.

Latneau challenges the voluntariness of his plea for the first time on appeal. He has failed to establish an actual violation of his constitutional rights, clear error, and prejudice, and has therefore failed to show fundamental error. Latneau's challenge to the voluntariness of his guilty plea must be rejected as unpreserved.

D. Latneau Has Neither Claimed Nor Shown Fundamental Error In His Assertion Of A Violation Of His Due Process Rights

Latneau argues, for the first time on appeal, that he was deprived of his due process rights. (Appellant's brief, pp. 6-15.) He has failed to show even one, much less all three, prongs of a fundamental error claim.

Latneau first argues that the no-contact order is "in effect" the "functional equivalent of a decree terminating parental rights," except it is "even more draconian," and therefore the state bore the burden of proving the need to terminate his rights by clear and convincing admissible evidence. (Appellant's brief, pp. 7-13.) Latneau also argues that his parental rights are "fundamental" and therefore the state must employ the "least restrictive means" of protecting the children which, he asserts, means supervised visitation. (Appellant's brief, pp. 13-15.) Application of the relevant legal standards to the record in this case shows that Latneau has failed to even allege, must less demonstrate, the three prongs he must establish to show fundamental error.

First, Latneau has failed to show any violation of his constitutional rights. Governmental interference in the right to raise one's child demands due process. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (permanent termination of parental rights requires proof by clear and convincing evidence). Generally speaking, the government may not interfere with the decision of a fit parent who adequately cares for his or her children. Troxell v. Granville, 530 U.S. 57, 69 (2000) (plurality) (per four justices with two justices concurring in the result). Thus, requiring a parent to rebut a presumption in a termination action violates Santosky's requirement that the state prove a termination case by clear and

convincing evidence. In re Jane Doe, 144 Idaho 534, 536, 164 P.3d 814, 816 (2007). Likewise, where a parent is fit a grandparent seeking to force visitation must demonstrate by clear and convincing evidence that such visitation is in the best interests of the child. Leavitt v. Leavitt, 142 Idaho 664, 669-70, 132 P.3d 421, 426-27 (2006).

The law is thus established that the government must prove by clear and convincing evidence an interest in restricting a parent's rights where the government is actually terminating a parent's rights or where the parent is fit and adequately caring for the child. Neither of these conditions applies in this case, however, because the order did not terminate Latneau's parental rights and the state proved him an unfit parent by an even higher standard of proof than clear and convincing evidence.

Latneau does not argue that he was, in fact, a fit parent, but does assert that the no-contact order is an order terminating his parental rights. (Appellant's brief, p. 9.) This argument is facially without merit. The order is limited in time and scope, with the court specifically exempting from the order any contact allowed in the divorce action between Latneau and the children's mother. Because Latneau has failed to show that his rights were terminated he has failed to show that the clear and convincing evidence standard applied.

Even if Latneau had argued that he was entitled to be treated as a fit parent until the state proved him unfit by clear and convincing evidence his argument would fail. Latneau's conviction for domestic violence was by an even higher standard—beyond a reasonable doubt—and therefore any claim that the

state did not prove its case by the lower clear and convincing standard would be without merit. Latneau has failed to show he was entitled to the clear and convincing proof standard for entry of a temporary no-contact order made after conviction and incarceration for acts of domestic violence.

Latneau also argues that the "least restrictive means" test applies to the no-contact order as a matter of substantive due process, and that the governmental interests could be achieved by supervised visitation. (Appellant's brief, p. 15.) While it is true that some fundamental rights are generally beyond the government's ability to infringe, unless such infringement is "narrowly tailored" to serve a compelling interest, to establish his claim of a substantive due process violation Latneau must establish both a "fundamental" right and a "careful description" of that right. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (rejecting fundamental right to assisted suicide). Latneau has failed to provide a careful description of his fundamental right, much less show that such right was infringed by government action not narrowly tailored to the governmental interest.

At the time the no-contact order entered, Latneau was going to prison for between two and seven years for domestic violence. (R., pp. 51-52.) His wife had filed for divorce. (12/21/10 Tr., p. 2, L. 22.) There is no reason to believe Latneau was going to have visitation in prison and he has not established a right to visitation beyond the scope of any eventual divorce decree. The court's order therefore merely provided for the eventual enforcement of the divorce decree through criminal sanctions if Latneau violated that decree. Latneau has no

fundamental right to visitation beyond what is in the eventual divorce decree; he has therefore failed to describe the interest being invaded by the no-contact order. Likewise, the scope of the no-contact order is intended to be limited to the scope of the eventual divorce decree. Latneau has thus failed to show that the no-contact order was not narrowly tailored to the involved governmental interest of protecting his victims.

Because Latneau has failed to show a constitutional violation arising from either due process or substantive due process, he has failed to show a constitutional violation. His claim of fundamental error therefore fails on the first prong.

Latneau has also failed to show the second prong of the fundamental error standard: that such error is clear on the record. He has certainly failed to cite to any case providing that he is entitled to the level of process he claims under circumstances even arguably similar to his own. His claim of error is thus not clear on the law. Likewise, there is reason to believe the lack of an objection was tactical because the court allowed Latneau to litigate visitation in the civil divorce arena. He has failed to show that the record establishes that he did not simply choose in the trial court to litigate his visitation rights in the divorce action.

Finally, Latneau has shown no prejudice. He does not articulate what parental rights he hopes to exercise from behind bars. He does not explain why the court's determination that he can litigate custody and visitation in the civil divorce arena is inadequate. The ultimate effect of the no-contact order is to give

criminal enforcement powers to the civil divorce and custody decree. Latneau's claim of fundamental error fails on the prejudice prong of the test as well.

Latneau has failed to show any of the three things he must show to establish fundamental error. He has therefore failed to demonstrate that his claims are reviewable on appeal.

II.
Latneau Has Failed To Show The District Court Abused Its Discretion By Relinquishing Jurisdiction

A. Introduction

Latneau asserts that the district court abused its discretion by relinquishing jurisdiction. (Appellant's brief, pp. 16-22.) Specifically, he claims the court made an erroneous finding of fact (Appellant's brief, pp. 16-19) and that the court generally abused its discretion by not putting him on probation (Appellant's brief, pp. 19-22). Review of the record shows neither error nor abuse of discretion.

B. Standard Of Review

Whether to grant probation "is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to relinquish jurisdiction is also a matter of discretion. See State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate. State v. Chapel, 107

Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984). "While a recommendation from corrections officials who supervised the defendant [during the period of retained jurisdiction] may influence a court's decision, it is purely advisory and is in no way binding upon the court." State v. Hurst, 151 Idaho 430, ___, 258 P.3d 950, 958 (Ct. App. 2011) (citing State v. Merwin, 131 Idaho 642, 648, 962 P.2d 1026, 1032 (1998); State v. Landreth, 118 Idaho 613, 615, 798 P.2d 458, 460 (Ct. App. 1990)). Likewise, an offender's "[g]ood performance while on retained jurisdiction, though commendable, does not alone establish an abuse of discretion in the district judge's decision not to grant probation." Hurst, 151 Idaho at ___, 258 P.3d at 958 (citing State v. Statton, 136 Idaho 135, 137, 30 P.3d 290, 292 (2001)).

The appellate court defers to findings of fact made by a sentencing court if those findings are "supported by substantial and competent evidence in the record." State v. Porter, 130 Idaho 772, 789, 948 P.2d 127, 144 (1997).

C. Latneau Has Failed To Show That The District Court's Factual Findings Were Not Supported By Substantial And Competent Evidence In The Record

At the retained jurisdiction review hearing the district judge asked Latneau about the proceeds of the sale of personal property from the defendant's house in Arizona and concluded there was a "reasonable inference" from the evidence that while incarcerated Latneau had been contacting family members to remove and sell marital property from his and the victim's house in Arizona. (12/21/10 Tr., p. 19, L. 13 – p. 24, L. 19.) Latneau claims that the district court's "factual finding that Mr. Latneau's disposition of his property constituted illegal or bad

behavior was clearly erroneous." (Appellant's brief, p. 16 (capitalization altered)). Latneau's claim cannot be reached because he has failed to provide an adequate appellate record.

The bases for the district court's conclusion there was a reasonable inference Latneau was taking and disposing of marital property were a September 2, 2010 investigative report regarding Latneau's recorded phone calls while in the retained jurisdiction program, submitted by the state, and the victim's statement that Latneau "had his brother steal" fixtures and other property that were "in our Arizona house." (12/21/10 Tr., p. 1, Ls. 20-23; p. 3, Ls. 9-24; p. 8, L. 9 – p. 9, L. 13.) Latneau has failed, however, to include the investigative report in the appellate record and fails to mention the victim's statement, which is in the record, in his argument.

The appellant has the burden of providing an adequate record to substantiate his or her claims of error before the appellate court. State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991); State v. Murinko, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). "In the absence of an adequate record on appeal, we will not presume error." State v. Longoria, 133 Idaho 819, 823, 992 P.2d 1219, 1223 (Ct. App. 1999). "Missing portions of the record must be presumed to support the action of the trial court." Id. at 823, 992 P.2d at 1223 (citing Kugler v. Drown, 119 Idaho 687, 690, 809 P.2d 1166, 1169 (Ct. App. 1991)). Because Latneau has not included the investigative report put before the district court at the review hearing, he has failed to provide an adequate record for appellate review of his claim of error.

Even if Latneau had not failed to create an adequate record for appellate review his claim would be without merit. The victim's statements to the court support the court's determination. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). Latneau has failed to show that the district court erred.

Latneau's argument that the district court lacked evidence is based wholly upon his failure to provide a complete record and his hope that this Court will ignore the evidence actually in the record. He has failed to show clear error in the district court's factual findings.

D. Latneau Has Failed To Show Any Abuse Of Discretion In The District Court's Decision To Relinquish Jurisdiction Without Placing Latneau On Probation

In relinquishing jurisdiction the court cited Latneau's criminal record, his history of domestic abuse, his history of substance abuse, his performance during the retained jurisdiction program, and the mental health evaluation, which indicated anger issues, low insight, a long history of abusive behavior, and a high risk to reoffend. (12/21/10 Tr., p. 25, L. 14 – p. 26, L. 23.) The court concluded Latneau would not succeed if placed on probation. (12/21/10 Tr., p. 26, L. 23 – p. 27, L. 2.) The court therefore relinquished jurisdiction. (12/21/10 Tr., p. 27, Ls. 4-5.)

The record supports the district court's conclusions. Latneau choked his wife because she did not know where his wallet and keys were. (PSI, pp. 1-2.)

The victim reported, "[T]his last time he actually tried to kill me. He bent me over the bed and strangled me and I had bruise marks across my neck." (12/21/10 Tr., p. 4, Ls. 2-5.) He has prior assault and disorderly conduct convictions, apparently as the result of prior domestic violence because he was ordered to complete parenting and domestic violence classes as a result of those convictions. (PSI, p. 5.) The victim reported that this was the third time he had victimized her and been arrested, and the prior times resulted in jail and counseling, but they did no good. (12/21/10 Tr., p. 4, Ls. 7-10.) She did not know what else she could do to protect herself and her kids because she believed he would seek her and the children out, so she was still "fearful for [her] life and [her] kids." (12/21/10 Tr., p. 3, L. 24 – p. 4, L. 19.)

The mental health assessment reported "a history of three violent offenses including this most recent Attempted Strangulation" and a "long history of abusive behavior and substance abuse." (Idaho Mental Health Assessment, p. 5 (attached to PSI, hereafter "Assessment").) It noted that Latneau claimed he has depression and mood swings but did not articulate symptoms indicating he is bi-polar. (Id.) Latneau has "anger management issues," is "impulsive," and has "limited ability to control his emotional reactions to relational interactions." (Id.) He "currently avoids responsibility for his actions and does not appear remorseful." (Id.) The Assessment concluded: "Based on his pattern of violent charges and current low insight, he is at a high risk to reoffend." (Id.)

In arguing an abuse of discretion Latneau relies primarily upon the Department of Correction's probation recommendation. (Appellant's brief, p. 20.)

The Department ultimately recommended probation based on Latneau's completion of, or participation in, low-risk offender, parenting, literacy, and career planning programs. (APSI, pp. cover, 1-2, 5.) This recommendation was despite Latneau receiving one formal disciplinary sanction for snorting another inmate's prescribed drugs and four informal sanctions. (APSI, p. 2.) Significantly, the Assessment was completed after the rider programming was done and still found Latneau's insight to be low and the risk of reoffense to be high. It thus appears that the programming during the retained jurisdiction program was not effective. In addition, the counseling did not address his drug addiction. It is also significant that Latneau previously engaged in programming similar to what he did during the retained jurisdiction program in relation to past domestic violence, which did not prevent continuation and even escalation of the violence, resulting in the present conviction.

Latneau also relies on "mitigating factors which support the conclusion that [he] is amenable to rehabilitation and does not pose a significant risk to society." (Appellant's brief, pp. 20-22.) While it is undoubtedly true, as asserted by Latneau, that his mother supports him, that he has earned a living in the past, that he completed 80 hours of community service, that he is addicted to drugs, and that he has some mental health concerns, these in no way diminish the district court's conclusion that Latneau would not be successful on probation.

Latneau has a history of domestic violence and was deemed to pose a high risk of reoffense. His programming during the retained jurisdiction did not reduce that risk. When all the evidence is considered, and deference to the

district court's ability to weigh that evidence is accorded, no abuse of discretion is shown.

CONCLUSION

The state respectfully requests this Court to affirm the order relinquishing jurisdiction and the no-contact order.

DATED this 13th day of February, 2012.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of February 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm